SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 85

ISIDORE EDELMAN,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF LOS ANGELES

BRIEF FOR PETITIONER

A. L. WIRIN,
FRED OKRAND,
ABRAHAM GORENFELD,
Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

Statutes and Other Authorities Cited

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Opinions Below

No opinions were delivered by the California Courts below, either upon the conviction of petitioner in the Municipal Court of the City of Los Angeles, County of Los Angeles, State of California, or upon the affirmance of that conviction by the Appellate Department of the Supreme Court, in and for the County of Los Angeles. Instructions by

the trial court set forth in full Transcript of Record at pages 40 through 49.

Jurisdiction

The judgment of the California appellate court was entered on October 18, 1951 (R. 54). The Appellate Department of the Superior Court is the highest court in California on appeal in a misdemeanor case. (*People* v. *Reed*, 13 Cal. App. 2d 39, Cal. Const. Art. VI, Sec. 4-b and 5.) This Court has jurisdiction under 28 U. S. C. 1257(3) in that the validity of a state statute is drawn in question on the ground of its being repugnant to the United States Constitution, and in that petitioner asserts that he has been denied rights claimed under the United States Constitution. These questions were appropriately raised in the California Courts (R. 15, 26, 45, 50-54). Petition for writ of certiorari was filed on January 18, 1952, and was granted on May 26, 1952, with leave to proceed *in forma pauperis*.

Statement of the Case

Pershing Square is a public park in the downtown area of the City of Los Angeles. During the day, hundreds of citizens could be found there, sleeping in the sun, feeding the pigeons, exchanging ideas or listening to the various park orators. Petitioner was one of those orators.

On September 22, 1949, petitioner was arrested in the park on a complaint charging him with vagrancy as a "dissolute" person (R. 1-2), a violation of subsection 5 of Section 647 of the Penal Code of California, which provides:

> "5. Every idle, or lewd, or dissolute person, or associate of known thieves . . .
>
> "Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Summary of the Evidence

At the time of the trial, the evidence, summarized in the Engrossed Statement on Appeal (R. 1-26), established that petitioner was a familiar figure in Pershing Square. Officer Covelli testified that he had seen petitioner speak 10 or 12 times a night for 18 months (R. 13) and various other witnesses testified they had heard petitioner speak in the park between 20 and 800 times (R. 2, 4, 6, 8, 9, 12, 13, 14, 15, 17). A review of the evidence discloses that petitioner spoke on political, economic, racial, religious and scientific problems (R. 5, 6, 8, 11, 12, 14, 15, 16). At the trial, petitioner testified as to the general content of his speeches (R. 18-21).

Petitioner's views were violently objected to by some members of his audiences. On one occasion he was dunked in the park fountain by a group of sailors and Marines (R. 14, 22). Very frequently, he was subjected to intensive heckling (R. 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 24). Although unqualifiedly contradicted by many defense witnesses and several prosecution witnesses, there is testimony in the record that petitioner reacted to the heckling by calling people "bastards" in the presence of women (R. 2); "fascist bastards, bums, dogs, degenerates, outcast Jews" (R. 5); that he ridiculed and baited men in uniform (R. 3), and referred to them as "rowdies and adolescents" (R. 4), and that he said that "the Catholic Church consisted of liars, promising pie in the sky; that the Pope was the master of a harem of black dressed women" (R. 6).

Langlois, Lamb and Shapiro, three of the leading hecklers, appeared at the trial as the chief witnesses for the prosecution. There was evidence that petitioner had accused Lamb, in cooperation with Langlois, with embezzling money collected for the "Civic Betterment Committee"

and the "American Homestead Association" (R. 3, 4, 5, 6, 7, 22) and that petitioner had accused Shapiro of having been involved in a morals charge (R. 3, 9, 10, 23). There was evidence also that the heckling was organized (R. 12, 14, 16, 17, 22, 23) and of recently begun police interference of petitioner's orations (R. 3). Persons friendly to petitioner or tolerant of him were arrested (R. 15, 16, 23) and petitioner himself testified without contradiction that he had been arrested recently, the first in his life, approximately 63 times, some 13 of the arrests followed by formal bookings on various charges, including a charge of malicious mischief, offensive conduct and defacing property in connection with his standing on a thick cement bench (R. 17-18). As a result of these charges, petitioner was convicted of "begging" some four or five times (R. 17, 13). In addition to the evidence of convictions for "begging", there was evidence that petitioner solicited funds in the park (R. 2, 3, 7, 9, 24) with and without the attendant distribution of literature, primarily his pamphlet "The Myth of the Iron Curtain".

Boyd Taylor, called as a defense witness, tetsified that he is the chief deputy of the criminal division of the city attorney's office, that those who repeatedly violate the Vehicle Code or laws against intoxication are never charged with vagrancy because these offenses do not involve moral turpitude or lax morals (R. 15).

At the time of trial, petitioner secured a subpoena duces tecum directed to the Police Department of the City of Los Angeles, to require production of records for the purpose of establishing that many persons were repeatedly convicted of violating the law, but had not been charged with vagrancy. The trial court granted the motion of Respondent to quash this subpoena (R. 50-54).

Summary of Instructions to the Jury

In instructing the jury, the trial court stated that the word "dissolute" "covers many acts not necessarily confined to immorality. Other laxness and looseness and lawlessness may amount to dissoluteness." (R. 45). "Dissolute" was defined as: "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual pleasures, profligate, wanton, lewd, debauched" (R. 45).

The trial court emphasized that one of the meanings of "dissolute" is "lawless" (R. 45-48) and instructed the jury that in determining whether petitioner committed any violations of law and was "lawless," it should consider the following: that it is unlawful to beg, to indulge in indecent language, to slander another, to use vulgar or profane language. Each of these crimes was defined in some detail (R. 47-48).

Summary of Proceedings

On November 7, 1949, the jury found petitioner guilty as charged (R. 34). The court denied a motion for new trial, judgment was entered against petitioner and he was sentenced to jail for 90 days, the sentence to run concurrently with a 90 day jail sentence on a charge of "begging" (R. 35, 2). On December 13, 1949, notice of appeal was filed by the attorney then representing petitioner, Leo Gallagher (R. 1).

Thereafter, on February 7, 1950, a substitution of attorneys was filed and granted by the trial court (R. 37). From that time, petitioner has been represented in all proceedings by present counsel, A. L. Wirin and Fred Okrand, including at least 8 court appearances between February 7, 1950 and

June 18, 1950 (R. 37-39) in connection with the settlement of Statement of Appeal.

However, by the mistake of the clerk of the Appellate Court, notification of the filing of the record on appeal, of the time for filing briefs and the time of hearing was mailed to Leo Gallagher, counsel for petitioner at the time of trial, who was then assured that notice would be sent to present counsel. (See affidavits of A. L. Wirin and Leo Gallagher in support of the motion to recall the remittitur, R. 56-57.)

Without the knowledge of present counsel (R. 57), the time for filing briefs expired and the appellate court summarily affirmed the judgment and order of the trial court (R. 54-55). Motion to recall the remittitur and to vacate the judgment of the appellate court was filed, and was denied by that court on January 9, 1952 (R. 58).

Specification of Errors To Be Urged

The Appellate Department of the Superior Court of the State of California erred:

1. In failing and refusing to hold, in effect, that the California "vagrancy-dissolute" statute is invalid as repugnant to the 14th Amendment to the United States Constitution by affirming the conviction of petitioner under a statute so vague, indefinite and uncertain that it fails to set forth ascertainable standards of guilt, thereby depriving him of his liberty without due process of law.

2. In failing and refusing to hold, in effect, that petitioner's right of freedom of speech was impaired by affirming his conviction under a vague and indefinite statute affecting that right.

3. In failing and refusing to hold, in effect, that petitioner's rights as guaranteed by the equal protection clause of the 14th Amendment to the United States Constitution

had been violated by reason of the discriminatory enforcement of the law.

4. In failing and refusing to afford petitioner due process of law in violation of the 14th Amendment to the United States Constitution in the prosecution of his appeal by the denial, in effect, of reasonable notice and opportunity for hearing and the representation of counsel on his appeal.

ARGUMENT

Summary of Facts and Law

Petitioner's argument may be summarized very simply and briefly. Contrary to *Lanzetta* v. *New Jersey*, 306 U. S. 451, he was convicted under a statute so vague, indefinite and uncertain, that even the city attorney's office and the trial court disagreed as to its meaning. Contrary to *Yick Wo* v. *Hopkins*, 118 U. S. 356, he was discriminated against in the administration of the law by being singled out for prosecution under a theory not theretofore used by the city attorney's office and denied a full opportunity to show that discrimination. Contrary to *Winters* v. *New York*, 333 U. S. 507, he, as an orator, prosecuted because of remarks made in the course of his speeches, was denied the right of freedom of speech by conviction under a vague and indefinite statute.

Then, contrary to *Powell* v. *Alabama*, 287 U. S. 45 and *Glasser* v. *United States*, 315 U. S. 60, when petitioner sought vindication in the California appellate court, which he had a right to do, that court summarily affirmed his conviction and subsequently refused to allow him reasonable notice or the representation of counsel in the presentation of briefs and oral argument on his behalf, in the face of the information that what had appeared to be an abandonment of the appeal was a situation caused through the inadvertence of the court's own staff, not by petitioner, or petitioner's former counsel or his present counsel.

I

Petitioner's Conviction Under Subdivision 5 of Section 647 of the Penal Code Deprived Him of Liberty Without Due Process of Law, Because the Statute Is Vague, Indefinite and Uncertain.

Subdivision 5 defines a vagrant as "Every idle, or lewd, or dissolute person, or associate of known thieves."

This court in *Lanzetta v. New Jersey*, 306 U. S. 451, 458, stated there were serious doubts as to the certainty of the phrase "any person not engaged in a lawful occupation." There are also serious doubts as to the word "idle" in the California statute. In *In Re McCue*, 7 Cal. App. 765, —, the court stated: "We are inclined to the view that while idleness . . . is a prolific source of crime, still it is not competent for the Legislature to denounce mere inaction as a crime without some qualification." But see *Ex parte Cutter*, 1 Cal. App. 2d 279.

Doubts exist also as to the phrase in the California statute, "associate of known thieves." In *Lanzetta v. New Jersey, supra*, this court declared ambiguous the phrase "known to be a member of any gang", commenting at page 458: "If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons." In *People v. Alterie*, 356 Ill. 307, 190 N. S. 301, the court held similar phraseology in the Illinois vagabond statute defining the crime as dependent on reputation a violation of due process. The California statute not only is vague and indefinite in the use of the phrase "known thieves" but goes further into the realm of speculation by making an "associate" of "known thieves" a vagrant. Must the "associate" have knowledge of the reputation? Must the "association" be such as to impute a similar reputation to the "associate", or may it be entirely divorced

from any connection with such reputation? May the "association" be with just one "known thief" or must it be with more than one?

As petitioner was found by the jury to be "guilty of the offense charged" (R. 34), presumably his conviction was based on the construction of the statute given in the trial court's instructions (R. 40-49), and constructions of the statute and of the word "dissolute" in the statute by other California courts is immaterial, as not, of course, considered by the jury. *Stromberg* v. *California*, 283 U. S. 359, 367; *Terminiello* v. *Chicago*, 337 U. S. 1, 4. For example, petitioner was not convicted of the "infamous crime against nature" as in *People* v. *Babb*, 103 Cal. App. 2d 326, where the court held that vagrancy was an included offense. Nor was petitioner charged with "dancing in the nude at a smoker" (*People* v. *Scott*, 113 Cal. App. (Supp. 778), or "indecent exposure" (*Ex parte Keddy*, 105 Cal. App. 2d 215), or "living with a prostitute" (*People* v. *Lund*, 137 Cal. App. 781), or of being a "peeping Tom" (*People* v. *Allington*, 102 Cal. App. 2d 914) or of other activities under which a construction of the terms "dissolute" and "lewd" as interchangeable, each applying to the unlawful indulgence of lust, may have seemed appropriate. See *In re McCue*, 7 Cal. App. 765.

The trial court confined the instructions to "what the evidence has been" (R. 44), and the instructions contained no definition of the word "lewd", nor was "unlawful indulgence of lust" mentioned. Aside from specific instructions on what could be considered "lawless", "lewd" and other terms importing an "unlawful indulgence of lust" were used but once in the entire instructions, in the general definition of "dissolute" as

> "loosed from restraint, unashamed, lawless, loose in morals and conduct, recklessly abandoned to sensual

pleasures, profligate, wanton, lewd, debauched." (R. 45.)

Admittedly, the evidence showed that petitioner, between arrests, was "loosed from restraint" in one sense of the phrase, and as he persisted in his oratory in the park despite the arrests, to some extent "unashamed". With the exception of "lawless", however, the record discloses little if any evidence of guilt under the other terms of the general definition, unless criticism of the morals of others, albeit made in what may have been rather vigorous language, shows indulgence in lust by some vicarious process.

Emphasis was placed on "lawless", however, in the instructions (R. 45-48), and this appeared to be the theory of the prosecution in the trial of the case (R. 52). This, it is submitted, was error, and where error occurs which, within the range of reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict. *Little* v. *United States*, 73 Fed. 2d 861, 867 (C.C.A. 10th), and see *Stromberg* v. *California*, *supra*.

What does "lawless", and thereby "dissolute" mean? In *Lanzetta* v. *New Jersey*, *supra*, 306 U. S. at 453, this court declared that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the state commands or forbids."

The trial court was informed by the city attorney's chief deputy that only where persons were repeat violators of crimes involving *moral turpitude or lax morals* were they prosecuted under this statute (R. 15), yet that court allowed the presentation of evidence of crimes not involving moral turpitude and instructed the jury that: "Now, the word 'dissolute', as you see from this definition, covers

many acts *not necessarily confined to immorality*. Other laxness and loosenes and lawlesness may amount to dissoluteness" (R. 45).

In *People* v. *Alterie, supra*, the court held that the Illinois vagabond statute offended due process because of the uncertainty of the phrase "all persons who are reputed to be habitual violators" of the law. The court stated that the statute nowhere defined "habitual violators." The same vice inheres in the word "lawless."

This argument is particularly forceful in view of the instruction given by the trial court:

> "You might be convinced beyond a reasonable doubt that he had committed any or all of the specific law violations of which there is evidence in the case, and still not conclude that he was of a lawless and hence of a dissolute nature. On the other hand, you might determine that he was lawless and hence dissolute, *even though you determine that he committed less than all of the violations* of which there is evidence in this case" (R. 46). (Italics added.)

Thus, the jury could have convicted petitioner upon determining that he committed one crime. In addition, although instructions were given that there should be a conviction only "if you believe beyond a reasonable doubt that such violations were actually performed by the defendant" (R. 46), as it was emphasized that the ultimate issue was his "character" (R. 45-46), it is possible that under these instructions, the jury concluded that petitioner was of a "lawless" "character" on the basis of twelve separate offenses as to no one of which all 12 members of the jury, differently instructed, would have agreed beyond a reasonable doubt. Under both the California Penal Code, section 15 and the basic theory of American criminal law (see, *People* v. *Alterie, supra*), crimes must be based on overt acts or omissions, not on guilty intentions. One may

be found guilty of being a "vagrant" only upon a finding of guilt beyond a reasonable doubt of the act or acts supporting such a characterization. See *People v. Klein*, 292 Ill. 420, 127 N. E. 79.

If a person may be convicted of vagrancy upon a showing of the commission of any crime, felony or misdemeanor, involving moral turpitude or not; under the catch-all term "dissolute" construed as "lawless", the statute offers no reasonable standard of certainty. As the California Supreme Court stated in *People v. Lee*, 107 Cal. 477, 480, "A person . . . charged with vagrancy is of right entitled to know whether he is called upon to meet the charge of being a common drunkard, or as being a dissolute associate of known thieves, or being a healthy beggar . . ." or otherwise.

Under the California Penal Code section 644, persons have notice that a third separate conviction of a felony may subject them to the punishment prescribed for "habitual criminals". See *People v. d'A Philippo*, 220 Cal. 620, certiorari denied, 293 U. S. 614. For persons successively convicted of separate misdemeanors, there is no notice from the specific language of the vagrancy statute that it was intended to be used as a "habitual criminal" statute for misdemeanants, nor does the charge with "dissoluteness" appear reasonably to give notice of such intention. This court stated in *Cole v. Arkansas*, 333 U. S. 196, 201: "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal."

It is not beyond the realm of probability that under the evidence presented and the trial court's instructions on

lawless, the jury found petitioner guilty because 1. he had a series of convictions for "begging" or 2. there was evidence of begging aside from the convictions. If the conviction was based on his prior convictions, he was, in effect, tried twice for the same crime. If the conviction was based on the evidence of begging aside from the convictions, petitioner was convicted under a subsection of which he had not been charged with violation (Penal Code, Section 647, Subdivision 2). In *Cole* v. *Arkansas*, *supra*, this court held this to be a violation of the due process clause, saying (333 U. S. at 201): "It is as much a violation to send an accused to prison following a conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made."

II

Petitioner's Right of Freedom of Speech Was Impaired By Reason of His Conviction Under a Vague and Indefinite Statute.

Petitioner's conviction was based upon the remarks made by him in the course of his speeches in Pershing Square. Because of these remarks, he was found to be a "lawless" person, and therefore, "dissolute." In instructing the jury, the trial court stated that, in determining whether petitioner committed any violations of law, the jury should consider the following: that it is unlawful to beg, to indulge in indecent conduct or indecent language, to slander another, to use vulgar or profane language. Each of these crimes was defined in some detail (R. 47-48).

Since the verdict was general, it cannot be determined what crimes the jury found the defendant to have committed, nor upon which instruction the conviction was based. Thus, if any of the instructions gave the statute a meaning which offended the constitutional rights of petitioner, this

court will invalidate the conviction. *Terminiello* v. *Chicago*, 337 U. S. 1.

In defining slander, the trial court used the same language which was condemned in *State* v. *Klapprott*, 127 N.J.L. 395, 22 A(2d) 877, cited with approval in *Winters* v. *New York*, 333 U. S. 507. In the *Klapprott* case, the New Jersey court had under consideration a state law prohibiting speech which "in any way incites, counsels, promotes, or advocates hatred, abuse, violence or hostility against any group" because of race, color, etc. In holding the statute unconstitutional, the court made the following statement, which this court quotes in the *Winters* case:

". . . That the terms 'hatred,' 'abuse,' 'hostility,' are abstract and undefinite admits of no contradiction. When do they arise? Is it to be left to a jury to conclude beyond reasonable doubt when the emotion of hatred or hostility is aroused in the mind of the listener as a result of what a speaker has said? Nothing in our criminal law can be invoked to justify so wide a discretion. . . .", (127 N.J.L. 395, pp. 401-402).

The same difficulty arises in the instant case. In the *Winters* case, this court stated, at page 509:

"It is settled that a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."

III

The Discriminatory Enforcement of the Law Violated Petitioner's Rights Under the Equal Protection Clause.

At the time of trial, petitioner's counsel made the following offer of proof in connection with the motion of the

People to quash the subpoena duces tecum requiring the Police Department to produce certain records:

"But one of the issues that was raised is that this defendant is being charged with being a vagrant because he has been convicted of some offenses. That is the way the case stands now.

"Well, I want to show by the police records that there are thousands and thousands of individuals in this city that are walking around that have committed many more offenses than this defendant that have never been charged with vagrancy" (R. 52).

This offer of proof was rejected by the trial court, although material to the issue of equal enforcement. Such proof would have shown the existence of the situation condemned in *Yick Wo* v. *Hopkins*, 118 U. S. 355.

A review of the record shows evidence that petitioner was not only being prosecuted under a theory contrary to the usual prosecution of the City attorney's office (R. 15), but that petitioner was frequently arrested, and persons supporting petitioner were arrested (R. 15, 16, 23). In the course of a little over one year, petitioner had been convicted of "begging" 4 or 5 times. Vagrancy is but one crime, *People* v. *Allington*, *supra*, and although a continuing one until reform (chronic rather than acute, *People* v. *Craig*, 152 Cal. 42), it is submitted that an enforcement of the law which, in addition to the other circumstances and prior convictions, results in two separate sentences for the crime on one day (R. 2) though given to run concurrently, indicates a seemingly overprecautious desire to have petitioner feel the full brunt of the law.

In *Yick Wo* v. *Hopkins*, *supra*, this court declared at pages 373-374: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal

hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

IV

Petitioner Was Denied Notice and Opportunity for Hearing and Representation of Counsel in the Appellate Court in Violation of the Due Process Clause.

At the time of trial, petitioner was represented by Leo Gallagher. On February 7, 1950, a substitution of attorneys was filed and granted (R. 37). Subsequently, petitioner was represented in all proceedings by present counsel. Leo Gallagher's name appeared on the Notice of Appeal filed, and, despite the substitution of attorneys and appearances by present counsel shown on the Docket Entries (R. 37-39) then on file in the appellate court, notice of appeal was sent to Leo Gallagher, and no notice was sent to present counsel. On page 10 of Respondent's Brief, the assertion is made: "If there was a failure of representation in the appellate court it was caused by petitioner's act of changing counsel and by reason of his trial counsel's failure to forward the notice of hearing to the substituted counsel."

In fixing the cause for the "failure of representation", Respondent appears to have overlooked the affidavit of Leo Gallagher (R. 56-57) stating that a very few days after receipt of the notice, he was personally assured by the person attending the desk in the Appellate Department that A. L. Wirin, one of present counsel, would be notified. That was approximately two months before the affirmance of the conviction by judgment reciting "This cause having been submitted without argument . . ." (R. 54)

As for petitioner's change in counsel, whatever his reasons, whether financial, or caused by the pressure of other

work by his trial attorney, if reasonable, petitioner was entitled as a matter of right to make a change. *People* v. *Durrant*, 119 Cal. 201, *People* v. *Lanigan*, 22 Cal. 2d 569. Petitioner's reasons were apparently considered reasonable by the trial court when it granted the substitution during the lengthy proceedings for settling the record on appeal, and when the substitution was brought to the attention of the appellate court and no allowance there made for it, he was denied reasonable notice and opportunity for hearing, essential requisites of due process of law. See *Powell* v. *Alabama*, 287 U. S. 45, 68, *Postal Telegraph Cable Co.* v. *Newport*, 247 U. S. 464, 476.

Under the California Constitution, Article 1, section 13, "In criminal prosecutions, *in any court whatever*, the party accused shall have the right to . . . appear and defend, in person and with counsel. . . ." (Italics added). These rights would imply but empty words if they were not available in the appellate process. The California courts have held "The right of appeal in criminal cases is guaranteed by the constitution and is as sacred as the right to a trial by jury. It is one of the means provided by the law to determine the guilt or innocence of the accused." *Ex parte Hoge*, 48 Cal. 3; *In re Adams*, 81 Ca. 163; *Smith* v. *McCallum*, 36 Cal. App. 143; *In re Albori*, 95 Cal. App. 42. It is the duty of the appellate court to afford the appellant protection in the presentation of his appeal. *In re Albori, supra.*

In *Glasser* v. *United States*, 315 U. S. 60, 76, this court stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." In *Powell* v. *Alabama, supra*, this court stated: "Under the circumstances disclosed, we hold that defendants were not accorded the right to counsel in any sub-

stantial sense. To decide otherwise, would simply be to ignore actualities."

It is submitted that when the circumstances were disclosed to the appellate court with the Motion to Recall the Remittitur and to Vacate the Judgment of that court, it indulged in nice calculations and ignored actualities when it denied the motion, in effect holding that that petitioner's right of appeal had not been violated, nor due process.

Conclusion

The judgment below should be reversed.

Respectfully submitted.

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